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No. 10-662

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ASWORTH, LLC (f/k/a Aswerth Corporation); HTF, LLC (f/k/a HT-Forum, Inc.); and D AVIATION SERVICES, LLC (f/k/a D Aviation Services, Inc.)

Petitioners,

v.

DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY (f/k/a Revenue Cabinet, Commonwealth of Kentucky)

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioners' Corporate Disclosure Statement was set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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INTRODUCTION

For the below reasons, and those set forth in the Petition for a Writ of Certiorari, the Court should grant review on both questions presented by the Petitioners.

A. Physical Presence – *Quill Corp. v. North Dakota*

The question of whether physical presence is required before the income taxation of an out-of-state corporate partner is constitutional under the U.S. Commerce Clause, as required by this Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), potentially affects millions of taxpayers. Likewise, it is an issue of constitutional significance as demonstrated by the express rejection by 35 or more state legislatures of this Court's holding in *Quill* through their enactment of statutes subjecting out-of-state companies to income taxation in the face of no in-state physical presence.

This situation is virtually identical to the one existing immediately before this Court's decision to hear *Quill*, when 36 states had enacted legislation rejecting the physical presence standard of *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753 (1967). Finally, the Kentucky lower court's decision is contrary to this Court's holding in *Quill*, and conflicts with other lower judicial and administrative decisions.

B. "Modest" Retroactivity – *United States v. Carlton*

United States v. Carlton, 512 U.S. 26 (1994), unequivocally sets forth the current test to determine if a non-curative, facially retroactive statute meets the

provisions of the Due Process Clause. Whether the retroactive legislation is "tax," "economic," "non-curative" or "remedial" legislation does not change the fact that *Carlton* requires that the period of statutory retroactivity be "modest." A 17-year retroactive change to a statute violates the *Carlton* modesty test.

This is simply the latest example of a state's blatant and improper revenue grab to come before the Court. The collective states must be called out on this conduct. As noted long ago by this Court, "The moral duty of a state to keep its word, in spirit as well as in letter, is no less than that of an individual." *Pacific Co. v. Johnson*, 285 U.S. 480, 501 (1932). By enacting retroactive legislation, the states are not honoring their word to their citizenry, so that the words of this Court seem particularly *apropos*: "A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it." *Chisholm v. Georgia*, 2 U.S. 419, 456 (1793); *see also Woodruff v. Trapnall*, 51 U.S. 190, 207 (1850) ("We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals.").

Compelling reasons therefore require that this Court grant certiorari to review these fundamental principles of constitutional law and provide certainty to taxpayers and taxing jurisdictions.

C. Factual Clarification

Nearly all of the material facts were stipulated. Even so, Respondent has mischaracterized certain key facts.

Respondent first states that Petitioners erroneously suggested that the parties stipulated that Petitioners had no intangible property in Kentucky; however, that is not the case. It was stipulated between the parties that Petitioners had no real or tangible property in Kentucky, and the evidence of record was undisputed that Petitioners had no intangible property in Kentucky. Nor does Respondent allege the existence of *any* property interests in Kentucky. *See* Paul Jones Deposition ("Depo"), at 626-63; Respondent's Exh. 16 thereto and Transcript of Kentucky Board of Tax Appeals ("KBTA") Hearing on October 12, 2005 ("H.T."), at 121-24.

Respondent also mischaracterizes the investment versus operational nature of Petitioners' partnership interests in Conwood Company, LP ("Conwood") and Conwood Sales Co., LP. ("Conwood Sales"). The record is undisputed that Petitioners held the partnership interests of Conwood and Conwood Sales strictly as passive investment interests. *See* Edwin S. Roberson Depo, at 18, 25-27; Pet. App. 115a.

I. THE QUESTION OF WHETHER THE COMMERCE CLAUSE PERMITS TAXATION OF OUT-OF-STATE COMPANIES WITH ONLY "METAPHYSICAL PRESENCE" IS ONE OF GREAT PUBLIC IMPORTANCE

In determining whether to grant certiorari, the Court does not, contrary to Respondent's assertion, require a "real and embarrassing conflict of opinion and authority." Brief in Opposition ("Op. Br.") at 9, citing *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70,

79 (1955) (quotations omitted). Respondent neglected to mention the alternative test for granting certiorari set forth in *Rice*, and misquotes the Court on this point; the Court actually stated that petitions should also be granted "... in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties ..." *Rice*, 349 U.S. at 79 (citation omitted). Review is also granted in instances of clear conflict. *See Langenkamp v. Culp*, 498 U.S. 42, 45 (1990).

Despite Respondent's claims to the contrary, this dispute is one of enormous importance to American business, as demonstrated by the Internal Revenue Service's own statistics confirming that 3,146,000 partnership income tax returns were filed in 2008 alone. *See* http://www.irs.gov/pub/irs-soi/08pareturnsnap.pdf (last visited Jan. 3, 2011).

Respondent's assertion that the Court should deny the Petition because states have enacted legislation providing for the taxation of out-of-state companies with no in-state physical presence is flawed. Before this Court's decision in *Quill*, 36 states had enacted legislation ignoring *Bellas Hess* and subjecting out-of-state companies with no in-state physical presence to collect use tax.[1] This Court has consistently interpreted the Commerce Clause "to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States."

1. *See* Laura A. Kulwicki, *State Taxation of Mail Order Sellers: An End to the Nexus Wars?*, STATE TAX NOTES, Nov. 11, 1991, at 332.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154 (1982). 35 states' enactment of legislation blatantly ignoring *Quill* demonstrates the widespread nature of the "quagmire" that still exists nearly 20 years after *Quill*. Indeed:

> . . . it has long been "accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

Japan Line, Ltd, v. County of Los Angeles, 441 U.S. 434, 454 (1979) (citation omitted).[2] As Congress has not acted in the nearly 20 years since *Quill*, this Court should step in.

Rejection of *Quill* in income tax cases is inconsistent with international tax policy requiring foreign taxpayers to have a "permanent establishment in the United States before the federal government can tax its profits." *See* Megan A. Stombock, *Economic Nexus and Nonresident Taxpayers: How Far Will It Go?*, 61 Tax Law. 1225, 1239 (Summer 2008). The merit of a bright-

2. *See also* Donald M. Griswold and Sara A. Lima, *An Apology Revisited: Intercompany Licensing of Intangibles In an Age of Tax Amnesties, Capitulation, and Judicial Confusion*, 15 Multistate Tax Report 189, 200, n. 46 (BNA Tax Management, Inc. 2008).

line rule "lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990). It is also illogical to require physical presence for use tax collection, yet only require metaphysical presence for income tax – after all, "we must never forget that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

How far can a State go? Without this Court's intervention, such disparate tax treatment will continue to create havoc for millions of American and foreign taxpayers.

II. THE COURTS ARE IN CONFLICT REGARDING WHETHER THE COMMERCE CLAUSE PROHIBITS STATE TAXATION OF OUT-OF-STATE COMPANIES WITH ONLY "METAPHYSICAL PRESENCE"

Respondent's strained efforts to portray this issue as settled only result in confirming that the issue is in chaotic conflict throughout the courts. While there are some factual distinctions in the conflicting cases, the truth is that the appellate courts of Tennessee, Texas and Michigan have issued decisions in accordance with *Quill*, contrary to the Kentucky lower court's decision and many other state court and administrative decisions. [Pet. at 19-21]. These decisions are in addition to the other decisions referred to in the Petition, which stands as submitted. The map and table of the *Quill* controversy [Pet. App. 120a-124a] demonstrate that courts frequently render decisions involving physical presence or metaphysical presence issues with

conflicting results. *See, e.g., KFC Corp. v. Iowa Dep't of Revenue*, No. 09-1032 (Iowa Dec. 30, 2010), issued only days ago, where the court rejected *Quill*.

In addition to the conflicting situations discussed in the Petition, countless state tax commentators have lamented the conflicts among the lower courts on this issue and the need for this Court to review the issue and determine whether physical or metaphysical presence is required before an out-of-state company is subjected to income taxation. *See, e.g.*, Jeffrey A. Friedman et al., *The U.S. Supreme Court Should Accept a Nexus Case*, State Tax Notes, Jul. 6, 2009, at 42; Scott D. Smith and Sharlene Amitay, *Economic Nexus: An Unworkable Standard for Jurisdiction*, State Tax Notes, Sept. 9, 2002, at 787.

The *Quill* map also highlights the states ignoring this Court. Lower courts are duty-bound to apply a directly applicable precedent unless that precedent has been explicitly or implicitly overruled: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Illinois v. Krull*, 480 U.S. 340 (1987).

III. THE KENTUCKY DECISION IS CONTRARY TO *QUILL* REQUIRING PHYSICAL PRESENCE UNDER THE COMMERCE CLAUSE BEFORE STATE TAXATION[3]

In *Quill*, this Court held that "substantial nexus" under the *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) test means "physical presence." *Quill*, 504 U.S. at 317. Despite Respondent's contrary rhetoric, *Quill* did *not* limit the application of the physical presence requirement to use taxes. Outwardly rejecting a case is one thing; this Court specifically stating that it was *not* doing so is entirely different:

> we have never intimated a desire to reject all established "bright-line" tests. Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does *not* imply repudiation of the *Bellas Hess* rule.

Quill, 504 U.S. at 314 (emphasis added). *Bellas Hess*' continued vitality regarding physical presence and the Commerce Clause was confirmed by its citation only months ago. *See Hemi Group, LLC v. City of New York*, 130 S.Ct. 983, 994 (U.S. 2010).

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3. Although Respondent claims that the lower court properly relied on *Borden Chemicals and Plastics, LP v. Zehnder*, 726 N.E.2d 73 (Ill. App. 2000), that case must be distinguished because there the taxpayer *stipulated* that it was subject to taxing jurisdiction. *Borden Chemicals*, 726 N.E.2d at 77.

Well-respected state and local tax commentators have confirmed that income taxes apply to out-of-state taxpayers only if they have in-state physical presence. *See, e.g.*, Griswold, *supra*, at 199. Professor Richard D. Pomp testified below that *Quill* applies to income taxes because:

> when *Quill* talks about physical presence as being the nexus standard, that is one nexus standard. We don't have a separate Commerce Clause for income taxes or property taxes. We have one Commerce Clause.

H.T. at 172-173.

IV. *CARLTON* REQUIRES "MODEST" RETROACTIVITY; 17 YEARS IS BY DEFINITION "IMMODEST"

A. Interest Accrues On Petitioners' Refunds – No "As Written" Constitutional Challenge Is Presented

Respondent's Brief in Opposition mischaracterizes the interest provisions of Kentucky law insofar as the suggestion is made to the Court that interest is inapplicable. Op. Br. at 5, 26-28. Thus, Respondent misstates the governing authorities and the applicable analysis. Kentucky law is clear that interest is due and owing to any taxpayer otherwise overpaying its taxes; this action is no different. Ky. Rev. Stat. § 134.580(1)&(4).

Ky. Rev. Stat. § 134.590 admittedly does not provide for interest in two circumstances: (i) ad valorem taxes,

and (ii) taxes imposed pursuant to a *statute* held unconstitutional. Petitioners are not now, nor have they ever, alleged that Ky. Rev. Stat. § 141.040 or Ky. Rev. Stat. § 141.206 are unconstitutional *as written*. Throughout the entirety of this proceeding, Petitioners have alleged that Kentucky statutes require Ky. Rev. Stat. § 141.040 and Ky. Rev. Stat. § 141.206 to be read *in pari materia* in light of applicable constitutional doctrine. When the statutes are properly construed, the conclusion is that Petitioners do not have nexus with Kentucky, resulting in an overpayment of tax and refund interest under Ky. Rev. Stat. § 134.580.

Respondent has always recognized that Petitioners have alleged that Ky. Rev. Stat. § 141.206 violates the Commerce Clause on an "as applied" basis. *See, e.g.*, Respondent's Reply Brief to the Franklin Circuit Court filed November 14, 2006 at 6; Petitioners' Response Brief to the Franklin Circuit Court filed October 18, 2006 at 22. Neither of these two arguments suggest that Ky. Rev. Stat. § 141.040 or Ky. Rev. Stat. § 141.206 are unconstitutional as written. Respondent's arguments that Ky. Rev. Stat. § 134.590 somehow preempts and prohibits interest from accruing on the overpayments are simply wrong as a matter of law. *See, e.g., Maximum Machine Co. v. City of Shepherdsville*, 17 S.W.3d 890 (Ky. 2000); *St. Ledger v. Kentucky Revenue Cabinet*, 942 S.W.2d 893 (Ky. 1997); *Revenue Cabinet v. Gossum*, 887 S.W.2d 329 (Ky. 1994).

B. The Bills Are Unconstitutionally Retroactive Under *Carlton*

Other arguments advanced by Respondent, as they relate to *Carlton* and the particulars of this case, miss

the mark as well. Specifically, Respondent's suggestion that House Bills 704 and 216 are of "modest" retroactive application fail by their own terms. Here, the period of retroactivity is 17 years [back to 1993], and far exceeds the "modest" boundaries required under the *Carlton* doctrine.

Respondent also suggests that the Bills were not "tax or economic legislation" [Op. Br. at 30], but rather that the Bills were "remedial" legislation. *Id.* This, too, is inaccurate and unsupported by the record. Respondent's policy assertions also fail as to why an interest rate differential is otherwise appropriate. Respondent advances among other reasons that commercial lenders charge more to loan money than they pay on deposits (such deposits forming the loan base that is effectively loaned out at a higher rate), as justification for the wisdom behind the interest changes enacted by the Kentucky General Assembly. *See* Op. Br. at 3-4. Even Respondent recognizes that the legislation has *economic* and *tax* overtones – to further allege that the Bills were not tax legislation is simply wrong. The expressed legislative purpose of the Bills was to amend Kentucky's tax statutes.

The "policy" asserted by Respondent as to *why* the Bills are appropriate legislation is (i) not supported by the record nor (ii) logical. Taken to its extreme, this "policy" would mean that the states "borrow" from its citizens at a rate materially less than that paid to its citizens. This is the exact fear advanced by this Court, albeit on the other foot: "A rate of interest on tax delinquencies which is low in comparison to the taxpayer's borrowing rate – if he can borrow at all – is a

temptation to use the state as a convenient, if voluntary, banker by the simple practice of deferring the payment of taxes." *Meilink v. Unemployment Reserves Comm'n of State of California*, 314 U.S. 564, 567 (1942).

For Respondent to now argue that the legislation was "remedial" is to liken it to a "curative" legislative act; the record is void of any such evidence. Assuming *arguendo* that it was "remedial" in nature, what was the legislature trying to remediate? If the legislation were "remedial," it was effectively making a retroactive change to legislation first enacted some 18 years previously, which undoubtedly calls into consideration the *Carlton* modesty analysis.

As to the conflict throughout the Country on the *Carlton* modesty issue and Respondent's views to the contrary, the cases set forth in the Petition stand as submitted. When taken as a whole, these are compelling, prompting reasonable minds to conclude that there is a difference of opinion on the *Carlton* modesty Due Process benchmark, which continues to this day. Only days ago, a lower court ruled that a legislative tax act having a retroactive period of 24 years violated Due Process under *Carlton*'s modesty test. *Tesoro Ref. and Mktg. Co. v. State of Washington*, No. 39417-1-II (Wash. App. Dec. 21, 2010). Not only is there a conflict, but the gulf among the states grows wider with each passing month. As to the several antiquated cases cited by Respondent, Petitioners' response is that they are all pre-*Carlton*.[4]

4. Respondent relies upon *Morley v. Lake Shore & M.S. Ky. Co.*, 146 U.S. 162 (1892), to somehow suggest that it controls. The legislation in *Morley* was by its own terms *not* retroactive. At best, *Morley* is inapposite.

The problem with the Bills is Kentucky's express desire to take tax money in the form of tax refund interest dollars and do so on an unlimited retroactive basis; by definition an "immodest" reach for the non-curative change. A decision now is needed. As this Court has noted, "[s]tudents of federal taxation agree that the tax system suffers from delay in getting the final word in judicial review, from retroactivity of the decision when it is obtained, and from the lack of a roundly tax-informed viewpoint of judges." *Dobson v. Comm'r of Internal Revenue*, 320 U.S. 489, 500 (1943).

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Petition should be granted, and this case should be heard.[5]

Respectfully submitted,

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5. Alternatively, this Court should issue a "Grant, Vacate and Remand" Order to the Supreme Court of Kentucky.